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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL VINCENT CASADOS, Defendant and Appellant.	E032093 (Super.Ct.No. RIF 096718) OPINION

APPEAL from the Superior Court of Riverside County. Suzanne W. Knauf, Judge. (Retired judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr., Supervising Deputy Attorney General, and Karl T. Terp, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Daniel Vincent Casados appeals from judgment entered following a jury conviction for first degree murder.[1] The jury also found true the allegation defendant used a deadly weapon during the commission of the offense.[2] The court further found defendant had one prior prison term[3] and one prior strike conviction.[4] The trial court sentenced defendant to 52 years to life in prison.

Defendant contends the trial court committed prejudicial instructional error by failing to instruct properly on malice aforethought; refusing to instruct on the lesser included offense of voluntary manslaughter; refusing to give CALJIC No. 8.73; misinstructing on the issue of premeditation and deliberation; and misdirecting the jury that it need not consider intoxication in determining whether the defendant possessed the requisite intent. Defendant also argues reversal is required based on cumulative error and the abstract of judgment should be corrected to reflect 436 days of credit for time spent in custody, rather than 430 days.

We conclude there was no prejudicial instructional error or cumulative error and affirm the judgment. The People do not dispute, and this court finds based on the reporter's transcript, that the abstract of judgment should be corrected to reflect 436 days,

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[1] Penal Code section 187, subdivision (a). Unless otherwise noted, all statutory references are to the Penal Code.

[2] Sections 12022, subdivision (b)(1) and 1192.7, subdivision (c)(24).

[3] Section 667.5, subdivision (b).

[4] Sections 667, subdivisions (c) and (e) and section 1170.12, subdivision (c).

rather than 430 days of custody credit. The abstract of judgment should be modified accordingly.

1. Facts

During the evening of April 13, 2001, defendant and his girlfriend, Reannon Cully, attended a birthday party for Ryan Piehl at Jeremiah Wallen's trailer home. Also in attendance were Jeremiah Hawthorne, Robert Watson, and several others, including the victim, Richard Telles.

Telles was a friend of Piehl and Hawthorne. Piehl invited Telles to his party. Telles arrived at 8:00 p.m. with two Hispanic men. One of Telles's companions, Mario, borrowed Watson's cell phone. About 20 minutes later, Watson discovered Mario had left with his cell phone. Telles and his other companion also had left the party.

When the other party attendees became aware that Telles and his companions had left with Watson's cell phone, they became angry at Telles. Piehl asked defendant to cover his back. Cully noticed defendant had a knife in his hand and demanded he give it to her. Defendant reluctantly handed her the knife on the condition Cully return it to him if he needed it. Cully hid the knife in the kitchen.

Hawthorne and two others went to Telles's home to retrieve the phone but Telles was not there so they returned to the party. Hawthorne, Piehl, and defendant smoked marijuana and complained about Telles and his companions. Others at the party also expressed anger towards Telles because one of his companions took Watson's phone.

Defendant was heard saying, the "fucking wet backs" were going to get what was coming to them.

Later that evening, Telles returned to the party with two other companions. Upon their arrival, Hawthorne confronted Telles about the cell phone. Telles denied taking it. Hawthorne suggested that one of Telles's previous companions had it. Telles said he would take care of it. Hawthorne, Telles, and one of Telles's companions then went to the backyard and Hawthorne and Telles smoked methamphetamine.

When Piehl discovered Telles had returned, he told others at the party, including defendant. Piehl, defendant, and others at the party followed Piehl outside. Cully told defendant, who looked angry, not to get involved.

Piehl confronted Telles about the phone. Telles said he did not know who took the phone. Piehl told him to leave and bring back the phone. Telles asked why he was being told to leave and, according to one of Telles's companions, assumed a fighting stance. Piehl punched Telles, knocking him to the ground. Telles was holding a flashlight at the time. He weighed 275 pounds and was 6 feet 7 inches tall. Hawthorne kicked Telles twice while he was on the ground.

Telles looked stunned and said, "What the fuck?" As he quickly got up, Piehl pushed Hawthorne away from Telles, indicating to Hawthorne to leave Telles alone. Piehl said to Hawthorne, "What the fuck are you doing, man. It's not going to happen like that." Telles looked angry and, according to Piehl, took an aggressive stance. Piehl told Telles to leave the party and not return until he had the cell phone.

Defendant then charged through the crowd toward Telles and stabbed him three times with a large kitchen knife. Telles did not attempt to defend himself or strike back. Telles slumped, staggered holding his stomach, crawled, and then collapsed. Piehl turned to defendant and said, "What the fuck did you do?" Defendant responded, "You want some too, mother fucker?" Cully told defendant to stop and leave. Defendant replied, "We have to go. I'm gonna get in trouble." Cully dropped defendant off at a bar. Telles was taken to a hospital and died the following morning from a stab wound to his abdomen. He also had a stab wound to his left arm and left hip.

Defendant was apprehended in Arizona. During an investigative interview, he admitted stabbing Telles. He said he did it for no reason. Defendant acknowledged Telles had done nothing to provoke him and was not harming anyone. Defendant said he was angry because Telles and his friends were rude; they were "maddogging" people at the party; he was asked to cover someone's back; and he was drunk and "too coked to give a shit," to the extent he "couldn't think straight."

During the trial, as defendant was entering the courtroom, defendant told Hawthorne to tell the authorities that Hawthorne, Piehl, and Cully made up the story about defendant stabbing Telles. Defendant told Hawthorne he stabbed Telles because Hawthorne and Piehl told him to back them up.

2. Malice Aforethought Instruction

Defendant complains the trial court erroneously instructed the jury on malice aforethought by failing to instruct the jury that in order to convict defendant of murder,

the jury must find the killing was not a consequence of provocation or imperfect self-defense.

The trial court instructed the jury on the definition of malice aforethought by giving CALJIC No. 8.11, the standard instruction defining malice, as defined in section 188. This instruction does not mention imperfect self-defense or provocation. The California Supreme Court in *People v. Dellinger*,[5] held CALJIC No. 8.11 adequately defined malice aforethought. Defendant argues the People's reliance on *Dellinger* is misplaced because *Dellinger* was decided before the California Supreme Court decided *People v. Rios*.[6] We find this an unpersuasive reason for disregarding *Dellinger*.

Citing *People v. Rios*,[7] defendant argues that the absence of imperfect self-defense or provocation is an element of murder and therefore "the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice."[8] In turn, defendant claims the court was required to instruct the jury that to prove murder, the People must establish the absence of imperfect self-defense or provocation.

Defendant misconstrues *Rios*. In *Rios*, the defendant was acquitted for murder and

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[5] *People v. Dellinger* (1989) 49 Cal.3d 1212, 1222.

[6] *People v. Rios* (2000) 23 Cal.4th 450.

[7] *People v. Rios, supra,* 23 Cal.4th 450.

[8] *People v. Rios, supra,* 23 Cal.4th at page 462.

retried for voluntary manslaughter. Our high court in *Rios* discussed malice in the context of differentiating between murder and voluntary manslaughter. In doing so, the court clearly stated that to refute a finding of malice in a murder case, the *defendant* bears the burden of proving beyond a reasonable doubt provocation or imperfect self-defense, unless the People's evidence suggests provocation or imperfect self-defense.

The *Rios* court stated, "[W]here the defendant killed intentionally and unlawfully, evidence of heat of passion, or of an actual, though unreasonable, belief in the need for self-defense, is relevant only to determine whether *malice has been established*, thus allowing a conviction of *murder*, or *has not been established*, thus precluding a murder conviction and limiting the crime to the lesser included offense of voluntary manslaughter. Indeed, in a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder."[9]

The absence of provocation or imperfect self-defense is thus not an element of murder. Therefore, unless there is substantial evidence of provocation or imperfect self-defense, the court is not required to instruct the jury that the People must prove an absence of provocation or imperfect self-defense.[10] "'A trial court need give a requested

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[9] *People v. Rios, supra,* 23 Cal.4th at pages 461-462.

[10] *In re Christian S.* (1994) 7 Cal.4th 768, 783.

instruction concerning a defense *only if there is substantial evidence to support the defense.*' [Citation.]"[11]

Defendant argues there was sufficient evidence of provocation and or imperfect self-defense to support such instruction. Provocation includes heat of passion and sudden quarrel. "'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.]"[12] "The test of adequate provocation is an objective one, . . . The provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment. Adequate provocation and heat of passion must be affirmatively demonstrated."[13]

Imperfect self-defense occurs when the defendant "kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense."[14]

Here, the trial court found there was insufficient evidence of provocation and unreasonable self-defense, and we agree. There was unrefuted evidence that, right before

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[11] *In re Christian S., supra,* 7 Cal.4th at page 783.

[12] *People v. Lee* (1999) 20 Cal.4th 47, 59.

[13] *People v. Lee, supra,* 20 Cal.4th at page 60.

[14] *People v. Lee, supra,* 20 Cal.4th at page 59.

defendant stabbed Telles, Telles was not threatening anyone. Piehl had just told Hawthorne, who had kicked Telles, to leave Telles alone, and had told Telles to leave and not return unless he brought back the phone. The evidence showed that, when defendant charged at Telles, Telles was unarmed, was not provoking or threatening anyone, and did not strike or attempt to strike defendant or anyone else.

During defendant's pre-trial statement to sheriff's detective Joseph Borja, defendant admitted that when he stabbed Telles, defendant was not defending himself or anyone else. Borja testified that defendant told him Telles did nothing to provoke the stabbing. Telles was not harming anyone. Defendant said Telles looked very surprised he had been stabbed. Right before defendant stabbed him, Telles looked scared and was in a defensive, rather than aggressive stance.

When Borja asked defendant why he stabbed Telles, he said there was no real reason for doing it. Defendant said Telles had not harmed anyone at the party nor was he in the process of doing so. With regard to the missing cell phone, defendant said Telles had no role in the theft of the phone. He was simply in the wrong place, at the wrong time, with the wrong people.

Since there was insufficient evidence of provocation or imperfect self-defense, the trial court was not required to instruct the jury that in order to convict defendant of murder, the jury was required to find an absence of provocation or imperfect self-defense.

3. Voluntary Manslaughter Instruction

Defendant contends the trial court erred in refusing to instruct on the lesser

included offense of voluntary manslaughter. During the trial, defendant requested the court to give a series of instructions on voluntary manslaughter, including instruction on imperfect self-defense and heat of passion. The trial court rejected the instructions, finding there was insufficient evidence of imperfect self-defense and provocation.

A trial court must instruct on lesser included offenses whenever there is "substantial evidence raising a question as to whether all of the elements of the charged offense are present. [Citations.] 'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' [Citation.]"[15] "[A] lesser included instruction need not be given when there is no evidence that the offense is less than that charged. [Citation.]"[16]

Voluntary manslaughter is a lesser included offense of murder.[17] "The distinguishing feature is that murder includes, but manslaughter lacks, the element of malice."[18] "Malice is presumptively absent when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation . . . ."[19] Imperfect self-defense also

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[15] *People v. Lewis* (2001) 25 Cal.4th 610, 645, cert. den. (2001) 534 U.S. 1045, quoting *People v. Barton* (1995) 12 Cal.4th 186, 201, footnote 8.

[16] *People v. Mendoza* (2000) 24 Cal.4th 130, 174, cert. den. (2001) 532 U.S. 1040.

[17] *People v. Sanchez* (2001) 24 Cal.4th 983, 989-990.

[18] *People v. Rios, supra,* 23 Cal.4th at page 460.

[19] *People v. Lee, supra,* 20 Cal.4th at page 59.

precludes a finding of malice.[20] A defendant tried for murder is not entitled to instructions on the lesser included offense of voluntary manslaughter if evidence of provocation or imperfect self-defense is lacking.[21]

Defendant claims evidence of heat of passion and unreasonable self-defense required instruction on voluntary manslaughter. Defendant argues evidence of heat of passion included evidence he was angry with Telles because one of Telles's companions had stolen Watson's cell phone and defendant was under the influence of drugs and alcohol when he stabbed Telles. Defendant argues evidence of imperfect or unreasonable self-defense included evidence he was defending Piehl who had asked him to cover his back. Also, Telles was getting up from having just been knocked to the ground. He looked angry and had a Mag Lite in his hand.

This evidence simply is insufficient to support a finding of provocation or imperfect self-defense. There is no evidence that Telles did anything to provoke defendant to stab him nor was there any evidence defendant was acting in self-defense or in defense of Piehl. As discussed above, Telles was not threatening or attacking anyone. Furthermore, even though there was evidence defendant was under the influence of alcohol and drugs, the evidence established he was sufficiently coherent and in control of his faculties to know what he was doing.

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[20] *People v. Rios, supra,* 23 Cal.4th at pages 461-462.

[21] *People v. Rios, supra,* 23 Cal.4th at page 463, footnote 10, italics omitted, quoting *People v. Sedeno* (1974) 10 Cal.3d 703, 715.

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There being insufficient evidence of imperfect self-defense or that defendant's "reason was actually obscured as a result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from passion rather than from judgment,"'"[22] we reject defendant's contention that the trial court erred in not instructing on voluntary manslaughter.

4. CALJIC No. 8.73

Defendant asserts the trial court erred in refusing to give CALJIC No. 8.73, which instructs the jury that it may consider evidence of provocation in determining whether defendant committed first degree premeditated murder.

CALJIC No. 8.73 states: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing it may have on whether the defendant killed with or without deliberation and premeditation."

Unlike voluntary manslaughter instructions, this instruction may be given based

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[22] *People v. Breverman* (1998) 19 Cal.4th 142, 163, quoting *People v. Berry* (1976) 18 Cal.3d 509, 515.

on evidence of inadequate or unreasonable provocation.[23] Provocation, as it relates to the issue of premeditation and deliberation, is not a defense but attempts to raise a reasonable doubt as to the premeditation and deliberation elements. It is therefore a pinpoint instruction.[24]

Defendant argues that even if there was insufficient evidence of provocation to support voluntary manslaughter instructions, there was sufficient provocation evidence to require giving CALJIC No. 8.73. There was evidence defendant was angry with Telles because of the cell phone theft. In addition, Piehl had just confronted Telles about the phone and Telles appeared angry because Piehl had knocked him down. Defendant also argues the manner in which he stabbed Telles reflected provocation. He charged Telles and rashly and impetuously stabbed him.

We conclude, as the trial court did, that this evidence was insufficient to require CALJIC No. 8.73. Defendant's anger over the phone theft was insufficient and there was no evidence Telles was threatening anyone.

Furthermore, even assuming the trial court erred in rejecting CALJIC No. 8.73, defendant cannot show prejudice because the factual question posed by CALJIC No. 8.73 was resolved by the jury under other properly given instructions, including CALJIC Nos.

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[23] *People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.

[24] See *People v. Saille* (1991) 54 Cal.3d 1103; *People v. Middleton* (1997) 52 Cal.App.4th 19, 28-33.

8.11, 8.20, 8.30, 8.31,8.70, 8.71, 8.74, and 8.75. In particular, the court gave CALJIC No. 8.20, which fully instructed the jury on the distinction between first and second degree murder. The trial court told the jury that, "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that *it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation*, it is murder first degree."[25]

Under this jury instruction and other instructions given to the jury, in order to find defendant guilty of first degree murder, the jury necessarily had to rule out any "other condition" precluding deliberation, such as provocation. Thus, contrary to defendant's view, the jury was not limited to an all-or-nothing choice once it determined that defendant intentionally killed Telles. Instead, under the above-mentioned instructions, the jury was presented with the option of finding defendant guilty of second degree murder. Consequently, even if we were to conclude that trial court erred in not giving CALJIC No. 8.73, such error was harmless.[26]

5. Intoxication Instruction

Defendant contends the trial court gave inadequate and misleading instructions on intoxication. Specifically, the instructions were misleading because they failed to direct

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[25] CALJIC No. 8.20. Italics added.

[26] *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.

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the jury that voluntary intoxication is relevant in determining the degree of murder. Defendant claims a jury instruction clarifying the relationship between intoxication and degrees of murder should have been given.

The trial court gave various instructions on murder[27] including CALJIC No. 4.21, which instructed the jury that if it concluded defendant was intoxicated when he stabbed Telles, the jury should consider his intoxication in determining whether defendant had the requisite intent. Defendant complains that none of the instructions, including CALJIC No. 4.21, told the jury that intoxication could preclude a finding of premeditation or deliberation.

Defendant also argues that CALJIC No. 4.21 misdirected the jury by stating, "If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you *should* consider that fact in deciding whether the defendant had the required specific intent [italics added]," whereas the instruction should have stated, "you *must* consider that fact." Defendant claims that, as given, the instruction indicated the jury was not required to consider evidence of intoxication when deciding whether defendant formed the requisite intent required for first degree premeditated murder.

In a criminal case, the trial court has a duty to instruct the jury on all general

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[27] CALJIC Nos. 2.02, 3.31, 3.31.5, 4.21, 4.22, 8.10, 8.11, 8.20, 8.30, 8.31, 8.70, 8.71, and 8.74.

principles of law relevant to the issues raised by the evidence.[28] "The 'general principles of law governing the case' are those principles connected with the evidence and which are necessary for the jury's understanding of the case. [Citation.] As to pertinent matters falling outside the definition of a 'general principle of law governing the case,' it is 'defendant's obligation to request any clarifying or amplifying instruction.' [Citation.]"[29]

Defendant did not object to instruction on intoxication, including CALJIC No. 4.21, or request modifications, changes, or additions to the instructions. Defendant thus waived his objections on appeal. "'The trial court cannot reasonably be expected to attempt to revise or improve accepted and correct jury instructions absent some request from counsel.' [Citation.]"[30] "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language. [Citation.]"[31]

In *People v. Saille,*[32] *People v. Castillo*,[33] and *People v. Hughes,*[34] the California Supreme Court indicated CALJIC No. 4.21 was an acceptable instruction. The

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[28] *People v. Kimble* (1988) 44 Cal.3d 480, 503; *People v. Estrada* (1995) 11 Cal.4th 568, 574.

[29] *People v. Estrada, supra,* 11 Cal.4th at page 574.

[30] *People v. Kelly* (1992) 1 Cal.4th 495, 535.

[31] *People v. Lang* (1989) 49 Cal.3d 991, 1024.

[32] *People v. Saille, supra,* 54 Cal.3d at page 1119.

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defendants in *People v. Saille* and *People v. Castillo* raised essentially the same instructional challenge raised here. The defendant contended in *Saille* "that the trial court erred in failing to instruct sua sponte that the jury should consider his voluntary intoxication in determining whether he had premeditated and deliberated the murder."[35] The court in *Saille* held the court did not have a sua sponte duty to give such a pinpoint instruction.[36] Likewise, here, since defendant did not request an instruction specifically stating the jury must consider defendant's voluntary intoxication in determining whether he had premeditated and deliberated the murder, there was no error in the court not giving such an instruction or modifying CALJIC No. 4.21.

The court in *Castillo* concluded CALJIC No. 4.21 correctly and fully instructed the jury to consider intoxication in determining whether the defendant had the requisite specific intent or mental state for murder, even though there was no specific instruction stating that the jury should consider intoxication in deciding whether the defendant

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[33] *People v. Castillo* (1997) 16 Cal.4th 1009, 1014-1015.

[34] *People v. Hughes* (2002) 27 Cal.4th 287.

[35] *People v. Saille, supra,* 54 Cal.3d at page 1117.

[36] *People v. Saille, supra,* 54 Cal.3d at page 1119; see also *People v. Castillo, supra,* 16 Cal.4th at pages 1014-1015 and *People v. Hughes, supra,* 27 Cal.4th at page 342.

premeditated the killing.[37] "A reasonable jury would have understood deliberation and premeditation to be 'mental states' for which it should consider the evidence of intoxication as to either attempted murder or murder."[38]

Defendant contends *Castillo* is distinguishable because in that case the court addressed whether CALJIC No. 4.21 was misleading in light of the rest of the instructions and the instant case's instructional context differs from *Castillo*. Defendant argues that, here, CALJIC No. 4.21 is misleading because the court told the jury it could consider evidence of heat of passion in determining the degree of murder but did not mention voluntary intoxication. Also, the corpus delicti instruction implied that the elements of the crime do not include the degree of the crime, thus misleading the jury as to the scope of the voluntary intoxication instruction. But defendant did not raise these objections in the trial court and thus waived them.[39]

Furthermore, CALJIC No. 4.21 and the instructions as a whole on intoxication and murder were proper and not sufficiently misleading or deficient to constitute reversible error. We reject defendant's claim the use of the word "must" rather than "should" in CALJIC No. 4.21 constitutes prejudicial error. Even in the context of the other instructions, which defendant claims caused the jury to be misled into disregarding

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[37] *People v. Castillo, supra,* 16 Cal.4th at pages 1015-1016.

[38] *People v. Castillo, supra,* 16 Cal.4th at page 1016.

[39] *People v. Estrada, supra,* 11 Cal.4th at page 574; *People v. Kelly, supra,* 1 Cal.4th at page 535; *People v. Lang, supra,* 49 Cal.3d at page 1024.

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defendant's intoxication, CALJIC No. 4.21 along with the other instructions on murder sufficiently instructed the jury on intoxication as regards the specific intent element of murder. The California Supreme Court held in *Saille, Castillo,* and *Hughes* that CALJIC No. 4.21 is proper, and the context in which the instruction was given in the instant case did not pose a substantial risk of actually misleading the jury not to consider defendant's intoxication when determining whether he had premeditated and deliberated the murder. It is not reasonably likely the jury was mislead to defendant's prejudice.[40]

6. Disposition

The superior court clerk is directed to correct the abstract of judgment to reflect defendant's presentence credits of 436 days of custody credit. The superior court clerk shall forward a corrected copy of the abstract of judgment to the Department of Corrections. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut
J.

We concur:

s/Ward
Acting P. J.

s/King
J.

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[40] *People v. Hughes, supra,* 27 Cal.4th at page 342; *People v. Castillo, supra,* 16 Cal.4th at page 1016.